United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-1823

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FOR THE SECOND CIRCUIT
No. 74-1823

VERMONT FOOD INDUSTRIES, INC.,
Plaintiff-Appellee,

— against —

RALSTON PURINA COMPANY,
Defendant-Appellant.

**ON APPEAL FROM AN ORDER AND JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
CIVIL ACTION No. 6753**

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BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

This civil action was commenced on October 25, 1972, by Vermont Food Industries, Inc. alleging that defendant Ralston Purina Company breached warranties of merchantability and fitness for particular purpose, breached express warranties, misrepresented the quality of its feed and was negligent in selecting and recommending the particular feed which it induced plaintiff to purchase. There was also a count for punitive damages contained in the complaint. After extensive discovery and numerous pre-trial conferences with the Court, trial of this matter commenced on January 8, 1974. The trial of the case consumed eleven days and during the trial, the Court eliminated the plaintiff's contentions that express warranties had been breached, refused to charge on punitive

damages, dismissed the strict liability claim and extracted a concession from plaintiff to abandon its negligence claim (A 402-03, 423-25, Tr. 1458). Thus, the Court's charge to the jury, to which defendant made no exceptions, was limited solely to breach of warranty (Tr. 1458, 1480). Plaintiff's testimony demonstrated losses totalling $336,764.74 (A 248, F 38, defendant' brief at 8). The jury's special verdict found t iat the defendant had breached warranties of merchantability and fitness for a particular purpose and determined plaintiff's damages to be $298,870. After the Trial Judge denied defendant's post-trial motions, this appeal followed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did not the Trial Court properly exclude defendant's offer of proof concerning the absence of receipt of complaints by defendant relative to its chicken feed?

2. Was there not sufficient evidence of defendant's breach of implied warranties to support a jury verdict?

3. Was there not an adequate basis for the introduction of expert testimony relative to flocks A-1, B-1 and C-1?

4. Were not the damages suffered by plaintiff clearly demonstrated and not speculative?

STATEMENT OF THE CASE

Vermont Food Industries, Inc. is a producer of eggs in northern Vermont. The principals of the corporation are Leopold and Jeannine Leriche who came to the United States from Canada, began growing chickens on a contract basis for other producers and finally began to grow chickens on their own. (A 113-16). In the end of 1969 or first part of 1970, plaintiff completed three modern buildings, the so-called complexes "A", "B" and "C" (A 20, 101, 119). As a result of a conversation with defendant's nutritionists in the summer of 1970 at which there were representations made that Purina

had a new improved feed which plaintiff should use, plaintiff decided that it would take Purina's advice and switch over to the new program (A 117, 120-21). Mr. Leriche testified that he didn't know what the composition of the new feed was (A 123). The laying birds in "A" building (Flock A-1) were the first laying hens to receive the new feed manufactured by Purina (A 121). However, the baby chicks that went into the new complexes in the fall of 1970 were fed on the new Purina program (A 122-24). Mr. Leriche indicated that in the course of managing his flocks, he goes around to the various chicken houses numerous times each day to inspect the flocks and that when the baby chicks went into the laying cages in the end of 1970, they were good plump birds with good shiny feathers and nice red combs, that these birds looked just the same as the birds that went into the laying cycle in 1971 and 1972 which were to become flocks A-2, B-2 and C-2 and all these birds were raised as chicks on Purina feed (A 124-25, 128).

The birds that went into these complexes did not produce well and in 1971 plaintiff observed that the birds were fat (A 127). This was also true of the flocks that were grown in Maine, the so-called Dostie Flock (A 132). The birds in the Dostie flock were also started on Purina's feed program in the fall of 1970 (A 148-49). Moreover, birds in another complex, the so-called "Homosote" house were also started on Purina feed and, when these birds went into the production or laying stage, they were switched over to feed supplied by the Pease Grain Company, a grain producer in Burlington, Vermont (A 138-39).

The serviceman from the Pease Grain Company, Mr. Morrill, testified that, in the course of supplying this "Homosote" flock with feed, he would visit the plaintiff's Vermont facility approximately once per week and during these visits, ever since early 1971, Mr. Leriche would complain to him about the low production the flocks in the new complexes "A", "B" and "C" were experiencing, however, he never complained about the homosote birds' product (A 25-27). Finally, Mr. Morrill sacrificed and opened up several birds from the new complexes in August of 1972 and found them to be terribly obese and had fantastic amounts of fat on them (A 26). Dr.

Murray, a veterinarian from the University of Vermont, examined birds from the "B" complex at about the same time and agreed with Mr. Morrill that these birds were extremely obese. In fact, his comment was that he had never seen birds this age this fat (A 27). Mr. Morrill, who has devoted 20 years of his life to the feed business, saw no evidence of disease or pathology in any of the birds that were examined (A 28-29). After explaining that the birds in complex "B" in 1972 were sister birds to the Homosote flock in that they were baby chicks hatched and grown together on Purina feed, Mr. Morrill testified that the Homosote birds did an excellent job for plaintiff and achieved high production, a fact born out by plaintiff's production records for this flock (A 29-32, E 7).

There was also testimony from Mr. Morrill that plaintiff had an excellently managed facility and that the ventilation and water and other management factors were very good (A 24-25). This was a view repeated by numerous witnesses who testified on this subject. (A 197, 259-60, 318). The validity of the Homosote flock as a control flock was further buttressed by Mr. Morrill's testimony that the conditions and environmental factors in both the Homosote house and the new complexes were identical for all practical purposes (A 21 22, 38).

At this time, the Pease grain had an 18 percent protein ratio and the Purina feed had approximately 14 to 15 percent protein (A 34, 218). It was uncontradicted that the brown birds in the Homosote house and Complex "B" were recommended by their breeder to receive a 17 to 18 percent protein ratio and brown bird breeders and geneticists in general recommend 17 to 19 percent protein for such birds (A 34-36).

These recommended ratios blended neatly with the testimony of Dr. Nesheim, defendant's expert on nutrition. In his treatise, the "Nutrition of the Chicken", Dr. Nesheim concluded that laying hens need 17.5 to 18.5 percent protein ratio (A 285). He indicated that this ratio can be reduced to 15 to 16 percent protein provided the amino acid balance is proper (A 286). If the amino acids are imbalanced in a low protein diet, loss of egg production and small egg size, two of plaintiff's

chief complaints, can result, according to Dr. Nesheim (A 287).

Dr. Nesheim also testified that in his book he warned that protein levels below 14.5 percent are not recommended because at those lower levels amino acid ratios can be imbalanced (A 288). Thus, defendant's own witness identified the low protein ratio of the defendant's feed as a problem area. In sharp contrast, the Pease grain at 18 percent, almost automatically gives the necessary requirements for amino acids (A 39). Dr. Snetzinger, defendant's chief nutritionist, indicated that chicken performance would suffer if the essential amino acid balance was too low and the way to maximize the availability of amino acids is to increase protein (A 164-65). On the subject of amino acids, the most defendant's witnesses would testify to was that its feed contains all the essential amino acids but nowhere was the relative balance of those acids indicated (A 331-32). The reason for this default became apparent at the trial when defendant's counsel revealed that it considers the amino acid balance in its feed to be a trade secret which it refuses to reveal (A 372-73).

The significance of protein in feed was identified by the nutritional experts as follows; a low protein ratio feed is considered to be a high energy feed and conversely a high protein ratio feed is a low energy feed. (A 168, 278-79). Consequently, the 14 percent protein ratio in the Purina feed was a high energy feed and in contrast, the Pease grain feed to the Homosote chickens, at 18 percent protein, was a low energy feed.

Added to this testimony was the concession by defendant's nutritionist, Dr. Snetzinger, that he has known for five or six years that brown egg birds, which comprised a large portion of plaintiff's flocks, have a tendency to overeat on energy (A 155-57).

There was abundant evidence as to the existence of grossly abnormal fat on the plaintiff's flocks. Mr. Morrill, Dr. Murray, Dr. Bryant, Dr. Hoffman and Mr. Mercia were among those reaching this conclusion (A 26-27, 40, 65, 190, 315). Similarly, the culprit for fat was identified as the feed. Dr.

Bryant, for example, succinctly declared that obesity and fatty liver syndrome is caused simply by too many calories. "It's got to come from feed", he said, "there is no other source on a commercial poultry farm" (A 66-67). Dr. Snetzinger also acknowledged that the source of fat is calories and the only source of calories is feed. (A 169-70).

Curiously, despite defendant's insistence that there was nothing wrong with its protein ratio or any other component of its feed, Dr. Snetzinger made a recommendation to plaintiff to increase the protein ratio in the feed, the purpose of which was to decrease the energy level in the feed (A 171). The same recommendation was made by Dr. Murray, the University of Vermont Veterinarian (A 46). An analogous recommendation was made by Dr. Gibbs who suggested that the birds' feed be cut by 10 percent in order to reduce the consumption of energy by the flocks. (A 100). In view of the higher energy or caloric content of the Purina feed and the extreme obesity of the birds, Dr. Hoffman, a nutritionist and experienced poultry manufacturer, concluded that the birds overate on energy and calories (A 203, 210).

Aside from fat and obesity in the birds, the experts also identified fatty liver syndrome (FLS) as a cause of the low production in the birds. Dr. Bryant, who is a member of the Nomenclature Committee of the Association of Avian Pathologists which gave FLS its name, concluded that these birds had FLS which normaly causes a 20 to 30 percent production decrease in birds. (A 58-63)

"FLS", said Dr. Bryant, "comes from too many calories" (A 66). In explaining why the Pease grain did not create obesity or FLS in the Homosote flock, Dr. Bryant stated that a bird uses the calories to digest the food and thus, it uses up more energy plus the energy in the high protein feed is at a lower level (A 78-79). The Maine, or Dostie, flock which was examined by Dr. Gibbs also showed that 60 percent of that flock had FLS in March 1972 (A 84).

Fatty liver syndrome, as explained by Dr. Bryant, is a set of characteristics which involves extremely fatty deposits in many organs of the body; a large amount or large pocket

of fat in the abdomen and in the surface of the bird's organs, fat deposits or lipoid bubbles of fat accumulate (A 60). Although defendant's brief spends an extraordinary amount of time on the matter of FLS, the basic point that the experts identified was extreme fat or obesity in the birds which caused FLS and also caused low production in the chicken (A 40, 59-61, 185, 205).

In addition to demonstrating that management problems did not cause or contribute to the low production, plaintiff also showed that disease was not a factor in the low production figures. As Dr. Hoffman testified, pathology was eliminated as a problem in the flocks he examined (A 182, 194). Dr. Murray also concluded that the flocks he examined had no significant disease problems (A 41, 43, 44). Dr. Bryant's conclusion on the flocks he examined was that the only problem with the birds was FLS and this is a nutritional problem which cannot be caused by disease (A 57).

Dr. Gibbs' testimony concluded that FLS was present in 60 percent of the birds. Furthermore, he found that the birds were abnormally fat and thus his findings of Marek's disease and luekosis is inconsistent because, as he admitted and Dr. Murray buttressed, these diseases are associated with a loss of weight and emaciation, not fat and obesity. (A 44-45, 85-87, 93-94).

Dr. Hoffman was present during the entire trial. His background in the area runs the gamut from a Ph. D. in Poultry Nutrition and Physiology to running a feed manufacturing facility in Massachusetts (A 177-181). Dr. Hoffman examined the birds in plaintiff's flocks in the modern complexes beginning in August 1972. After finding that the birds were not diseased and that management was above average, he concluded that the birds were obese and suffered from FLS (A 182, 197). He also compared the birds in the complexes with the birds in the Homosote house and found those birds to be in good order and the ones from the complex to be fantastically fat (A 190).

In Dr. Hoffman's opinion, the reason the birds in flocks A-2, B-2 and C-2 got obese and suffered reduced production

was because they overconsumed on energy (A 203-04). Dr. Hoffman clearly stated that, based on his experience, it is the feed manufacturer's responsibility to control the energy level of the feed that the chickens consume (A 204-05). Dr. Hoffman was also asked to assume that the birds that were housed in the complexes in 1971 (flocks A-1, B-1 and C-1) looked the same as the birds did going into the houses in 1972, that the feed program was the same, that the low production figures were very similar and that there were no disease factors that would affect production, and with these assumptions, if he had an opinion as to whether the cause of the poor production in the early flocks was the same (A 208-09). Dr. Hoffman's answer was that those facts were consistent with the diagnosis of the birds becoming too fat and the reason for this is that they over-consumed on energy (A 209-10). In short, Dr. Hoffman's testimony was that as to all the birds in the Vermont complexes (flocks A-1, B-1, C-1, A-2, B-2 and C-2), these birds were obese and fantastically fat because they were on too high an energy diet resulting from the feed supplied by defendant (A 214).

Dr. Snetzinger testified that he knew that brown birds have a definite tendency to overeat and thus, since the Vermont complexes had large numbers of brown egg birds, this problem was exacerbated (A 155-57). Significantly, the Homosote birds which produced well and did not get fat were also brown birds (E 7). In Dr. Bryant's opinion, the Pease grain resolved the problem whereas the Purina grain did not (A 69-71).

Plaintiff's demonstration of the damages it suffered as a result of the defendant's feed employed the following methodology. First, plaintiff demonstrated by charts prepared by breeders and chicken geneticists the number of eggs its birds would have produced had the defendant's grain performed as warranted. These prouction figures were not idealistic or maximized production goals but were the production figures to be expected from these birds under normal conditions (A 18-20, 37). Dr. Hoffman, utilizing his experience in the chicken production industry, stated that the production level

curves present on plaintiff's charts are readily attainable and practically achievable levels (Tr. 697-98). Where possible, the production to be expected was biased in defendant's favor by, for example, only claiming loss from the lower production graph figure where a graph had two production curves or using a brown bird egg chart to measure white bird egg production and since white birds generally peak higher than brown birds the loss was less. (A 257-58, 292-94).

Measured against this figure of eggs that should have been received was plaintiff's computation of eggs that actually were received. In this regard, plaintiff demonstrated that the egg production records were compiled from slips which the employees counting the eggs gave to Mrs. Leriche on a daily basis and which would be added up on a weekly basis by her (A 102-03, 108). In 1971, automatic counters were installed in complexes "A", "B" and "C" (A 104). The difference between the "dozens which should have been produced" and the "dozens actually produced" constituted the framework for plaintiff's next step in its damage computation. In order to meet its demand for eggs, plaintiff was required to purchase eggs (A 141-42). The source for the eggs purchased was Ralston Purina (A 142). The damages in dollars plaintiff suffered were based on the amount of money plaintiff had to pay to get replacement eggs from Ralston Purina that it did not get from its own flocks (A 248-49). The total sum spent for all the flocks was $336,764.74 (A 248). After hearing all the evidence, the jury returned a verdict of $298,870 which, because of a stipulated counterclaim for feed supplied by defendant and not paid for was reduced to $177,309.31.

ARGUMENT

I.

THE TRIAL COURT PROPERLY EXCLUDED DEFENDANT'S OFFER OF PROOF CONCERNING THE ABSENCE OF RECEIPT OF COMPLAINTS BY DEFENDANT RELATIVE TO ITS CHICKEN FEED.

At the outset, it must be observed that defendant's brief expands beyond all reasonable limits the kind of proof it sought to admit in its offer of proof and the significance of this proof to its case.

Defendant called as a witness its manager of chow complaints at its general headquarters in St. Louis, Missouri (A 370). The witness had been employed in that capacity for approximately five years (A 370-71). The preliminary testimony of this witness is instructive concerning the propriety of the District Court's ruling on the admissibility of certain testimony offered by defendant. The witness, Mr. Marsh, testified, in effect, that he is responsible for complaints concerning all chow products except dog and cat chows, including, but not limited to animal feed for "dairy, beef cattle, poultry, general poultry hogs, horses, fish, laboratory animals" and feed fed to various wild animals at the St. Louis zoo (Tr. 1206-07). In describing the process whereby complaints from animal producers are filtered, screened and eliminated as they progress through the Ralston Purina hierarchy, Mr. Marsh indicated that where there are problems in the field, if no decision or resolution can be made by the Ralston serviceman or salesman, the problem is then forwarded on to Mr. Marsh (A 371). Furthermore, he testified that he is only responsible for problems which are "directly related to the feed" (A 371) and the tenor of his testimony in this regard was that his concern was primarily over the composition, physical properties and relative protein balance of the feed itself (A 371, Tr. 1208-14). Nowhere was there any indication that Mr. Marsh had any responsibility for handling complaints concerning the feed program devised by defendant or the advice and instructions defendant provided with the sale of the feeding system.

Within this context, defendant asked Mr. Marsh "whether any complaints in relationship to the formulation of the L. C. Program Layena was filed with you?" (A 375). Plaintiff's counsel objected to this question and after extensive conference in chambers at which defendant supplied the Court with a memorandum of law on this point, defendant withdrew the pending question and proposed the following questions to the Court for a ruling on the admissibility of answers to them. The questions were: "Have you received poultry feed samples on (sic) complaints involving the nutritional standards of poultry chows" and "Have you received poultry feed samples on (sic) complaints involving Purina's poultry program?" (A 386). The supposed answer to these questions was "No." (A 386).

It is submitted that in excluding this testimony the Court was clearly correct and acted in accordance with established law. As the Court properly observed, the evidence defendant sought to admit simply is not probative of the real point defendant was trying to get before the jury, namely, that no complaints concerning the defendant's product existed. No logical nexus is demonstrable between the existence of a complaint whether similar to plaintiff's complaint or not, and the presentation of that complaint to defendant and the processing thereof through the bureaucracy of the largest poultry feed manufacturer in the world to the Manager of Chow Complaints for the entire organization.

The irrelevance of such proof has received judicial recognition. In **Fortunato v. Ford Motor Co.**, 464 F. 2d 962 (2nd cir. 1972) **cert denied** 409 U. S. 1038 (1972), this Court ruled that the absence of complaints in waranty cases are rarely probative proof of defects. In so ruling, the Court stated that:

> "It is highly questionable whether evidence showing the absence of any similar complaints would be admissible in this case which was primarily one for breach of warranty, because the plaintiff withdrew any reliance on a negligence theory during trial. A breach of warranty gives rise to strict liability which is not necessarily negated by a showing of due care or a lack of knowledge of the defect on the part of the manufacturer or seller.

(Citing cases) **Therefore, evidence of a lack of prior complaints is rarely probative on the warranty issue** (Citing cases). 464 F. 2d at 967 N. 1.

The application of **Fortunato** to the case at bar is heightened when it is recalled that Vermont Food Industries also had a negligence claim which did not go to the jury.

In **Van Lill Co. v. Frederick City Packing Co.** 155 Md. 303, 141 A. 898 (1928), the absence of any complaints from other purchasers of defendant's corn rejected by plaintiff was held to be too remote to have probative force. The Court in **Reed Grocery v. Miller**, 36 Okla. 134, 128 Pac. 271 (1912) also ruled as "wholly irrelevant" the absence of complaints from other sales of defendant's product. See also **Hutchinson Lumber Co. v. Dickerson**, 127 Ga, 328, 56 S. E. 491 (1907).

Moreover, the facts adduced by defendant itself demonstrate that the probity of its offer had an additional disability. The defendant boasted that its sales of poultry feed alone exceeded one million tons per year and were made throughout the United States and abroad. Faced with such a gargantuan it is submitted that many complaints which may have existed either would not be made, would be adjusted before they reached the top Purina management personnel such as Mr. Marsh or would simply not be followed through by the complainant. Since no readily ascertainable method exists of establishing the above factors, a highly misleading, inaccurate and potentially prejudicial effect could result from the introduction of such testimony. It is submitted, therefore, that the trial court accurately read the law in holding defendant's offer irrelevant.

The Court's ruling was also grounded upon the obvious hearsay characteristics of defendant's offer. It is submitted that a plethora of precedent supports Judge Coffrin's decision on this point.

In **Ryalls v. Smith**, 124 Vt. 44, 196 A. 2d 494 (1963), the Vermont Supreme Court held that the general rule is that the courts will not receive testimony of a witness as to what some other person told him as evidence of the existence of the fact asserted. Similarly, in **West-Nesbitt v. Randall**, 120 Vt. 481,

236 A. 2d 676 (1967), the court stated that the "clearest case of hearsay is where a witness testified to the declarations of another for the purpose of proving the facts asserted by the declarant". The offer of the defendant came within that proscription and was thereby rendered inadmissible.

Although the precise issue does not appear to have ruled on by the Vermont Courts, most courts in other jurisdictions which have considered the question have excluded such testimony. In **United States v. 11¼ Dozen Packages Etc.**, 40 F. Supp. 208 (W.D.N.Y. 1941), the court ruled evidence that no complaints were received on a drug over a ten-year period incompetent as "clearly hearsay". See also **George W. Saunders Live Stock Comm. v. Kincaid**, 108 S. W. 977 (Tex. Civ. - App. 1914) (that a complaint was or was not made would appear to be pure hearsay).

The New York experience is also consistent with this result and two New York cases are of particular relevance to the case before the Court. In **Altkrug v. William Whitman Co.** 185 App. Div. 744, 173 N. Y. S. 669 (1919), the quality of goods was at issue. The admission of evidence that there had been no complaints by subsequent purchasers of the exact same cloth was held to be clearly hearsay evidence constituting reversible error by the trial court. It was indicated that this type of hearsay "was most mischievous evidence". 123 N. Y. S. at 671. In **James Thomson Co. v. International Compositions Co.**, 191 App. Div. 553, 181 N. Y. S. 637 (1920), in a fact situation similar to **Altkrug**, the court held that "the fact that these other customers had made no complaint as to the quality of these goods sold to them was purely hearsay evidence" and consequently inadmissible. 181 N. Y. S. at 639. See also **Menard v. Cashman**, 94 N. H. 428, 55 A. 2d 156 (1947).

The rationale of **Altkrug** and **Thompson** apply **a fortiori** to the case presently before the Court since the evidence in those cases was that there were "no complaints"; whereas, in the instant case, defendant's offer was limited to testimony that no complaints were received. Moreover, in those cases the courts excluded evidence concerning the exact same item whereas in the instant case no effort was made by the defend-

ant to limit its offer to the same kind of feeding program and same kind of circumstances as the plaintiff's.

The absence of limitation or specificity in the defendant's offer was another factor supporting the Judge's decision to exclude this evidence. The proof of similar circumstances has been held by many courts to be essential to the admissibility of such evidence. See, e.g. **Siegel King and Co. v. Penny & Baldwin** 176 Ark. 336, 2 S. W. 2d 1082 (1928); **Watson v. Bigelow Co.**, 77 Conn. 124, 58 A. 741 (1908); **New York Canners v. Milbourne**, 247 N. Y. 46, 160 N. E. 914 (1928). Defendant's proof was postulated on the theory that its sales of chow were of such magnitude that if a problem existed it would necessarily have manifested itself prior to plaintiff's action in the form of a complaint received by Mr. Marsh. However, this imprecision and broad-based proof would only serve to create confusion, prejudice and inject new and collateral issues before the jury. Thus, even assuming **arguendo** that hearsay and relevance were no bar to the admissibility of this offer, its blunderbuss impact with no attempt by defendant to limit the offer to similar feeds, feeding programs, flock management conditions and other variables simultaneously proves too much and proves too little. Consequently, the trial judge clearly ruled properly on this evidentiary question.

II.

THERE WAS SUFFICIENT EVIDENCE OF DEFENDANT'S LIABILITY FOR BREACH OF IMPLIED WARRANTIES TO SUPPORT A JURY VERDICT

The predominant portion of Defendant's second argument is devoted to a misleading review of numerous cases allegedly supportive of the proposition that to avoid a directed verdict, plaintiff was required to demonstrate and isolate by a preponderance of the evidence a specific defect in the defendant's product as the cause of the loss it suffered. The application of most of this precedent dramatically pales when it is considered that defendant's citations encompass the spectrum of liability from negligence in the sale of feed such as the so-called "foreign materials" cases (See Appellant's Brief at 26) to a strict liability case involving personal injury. (Appellant's Brief at 28). The case before this Court is solely concerned with a jury finding that defendant breached an implied warranty of merchantability, and an implied warranty of fitness for a particular purpose.

It is submitted that defendant's expansive contention that direct proof of a specific defect is necessary to support liability is effectively refuted by applicable Vermont case law. In **Patton v. Ballam & Knights**, 115 VT. 308, 58 A. 2d 817 (1948), the Vermont Supreme Court succinctly reviewed the plaintiff's burden in a breach of warranty case involving property damage:

> What caused Plaintiff's losses? No absolutely positive answer can be given. **No such answer is required by law.** In the very nature of things, no direct proof of the cause of the trouble can be given. **Direct proof is not necessary. Circumstantial evidence may be resorted to, and such evidence will be sufficient to satisfy the verdict below if there can be drawn therefrom the rational inference that the defendant's product was the source of the trouble.** There must created in the minds of the jurors something more, of course, than a possibility, suspicion or surmise, but the requirements of the law are satisfied if the existence of this fact is made the more probable hypothesis when considered with reference to the

possibility of other hypotheses. Nor is the reasoning to be employed in such cases necessarily that of cultivated and practiced minds; it is that of ordinarily intelligent understanding. 115 VT at 314. (emphasis supplied).

See also Boguski v. City of Winooski, 108 VT. 380, 187 A. 808 (1936).

This test must be coupled with the axiom that on an appeal by a defendant who unsuccessfully sought a directed verdict and a judgment notwithstanding the verdict, as in this case, the reviewing court is required to view the evidence in the light most favorable to the plaintiff. See e.g. Lumbra v. United States, 290 U.S. 551 (1934); Lafaso v. Lafaso, 126 VT. 90, 223 A. 2d 814 (1966). Thus considered, it is apparent that defendant's attempt to void the jury's judgment is unavailing.

The basic methodology employed by Plaintiff was to identify for the jury the sources of difficulty in chicken egg production. Basically, three distinct areas exist; Management, which includes housing, heat, light, water and air; disease and feed program (A 16).

Significantly, defendant never introduced any other elements which would have an impact on chicken egg production. To demonstrate the baselessness of defendant's claim, it is instructive to review the evidence which discounted problems in each of the potential problem areas and thus focused on the feed and the Ralston feeding program as the culprit.

A. The Jury Could Find From the Evidence that Management of the Flocks Did Not Cause the Production Problem.

Virtually every witness testified that Vermont Food Industries had good production management and that the housing, water, heat, air and light were properly regulated. Mr. Morrill, an experienced poultry feed manufacturer, observed all of plaintiff's Vermont installation and concluded that the ventilation situation was "very good, very adequate" (A 25) and that the water situation was "very good" (A 25). Mr. Mercier, an extension poultryman at the University of Vermont, had the same observations. (A 259, 299-300).

Even defendant's witnesses freely acknowledged that the management and operation of all the buildings in which plaintiff's chickens were grown were good and entirely satisfactory (A 318-19, Tr. 999-1000, 1186). Dr. Hoffman, one of plaintiff's experts who had extensive chicken production experience, testified that the management conditions of all the Vermont-based flocks was "above average" (A 197-98). In his opinion, any question of plaintiff's mismanagement of any of the factors such as heat, light, air and water could be excluded as a cause of plaintiff's low production (A 198). The ultimate proof of this, of course, and proof which would have had a telling effect on the jury is that with the same management conditions and a physical plant that was not as modern as the plant where the Purina chickens were housed, plaintiff obtained entirely satisfactory production results with sister birds fed by another supplier under a different feeding program (A 29-32, 140, 189).

Defendant's Brief understandably avoids reference to the topic of management of the flocks because as the Record abundantly demonstrates, there is no real question about the high quality of plaintiff's chicken flock management.

B. There Was Sufficient Evidence From Which a Jury Could Conclude That Disease not Caused by Feed or Feed Programs Was Not a Factor in Plaintiff's Low Production.

Plaintiff also demonstrated to the requisite degree that disease was not a debilitating factor in Plaintiff's flocks. There was evidence at the trial that laying chickens are susceptible to a wide variety of diseases. See e.g. (A 28, 44-45). However, the evidence was clear that all of these diseases were eliminated as a cause of plaintiff's problem. Dr. Gibbs, in examining the Dostie flock in Maine testified that 60 % of the flock had fatty liver syndrome (A 84). This was Dr. Gibbs' final diagnosis (A 86-87). Moreover, Dr. Gibbs testified that if the flock in fact had Marek's disease, lymphoid leukosis or coccidiosis which defendant contends it had there would be a loss of weight in the birds (A 93). Quite the contrary to this, Dr.

Gibbs found the birds be examined to be "depositing tremendous amounts of fat in their bodies". (A 85-87).

In the flocks in the Vermont complexes "A", "B" and "C", the evidence was clear that disease was eliminated as the cause of low production in the birds (A 41-42, 194). In short, plaintiff eliminated the other causes of low egg production not only by a tendency of the evidence, but by a preponderance of the evidence. Taking the favorable presumption of the evidence which plaintiff enjoys at this stage of the case, it cannot be said that defendant's feed was not isolated as the causative factor in plaintiff's low egg production.

C. Defendant's Argument that the Cause of Fatty Liver Syndrome or Obesity in Plaintiff's Flock was Equivocal Finds Absolutely No Support in the Record.

Plaintiff strenuously excepts to the glib conclusion at Pages 32-33 of defendant's Brief that plaintiff's experts speculated as to the cause of the excessive fat found in the birds in Plaintiff's flocks. Defendant's contention on Page 32 of its brief that the expert witnesses could not identify the actual cause of the so-called Fatty Liver Syndrome or obesity ignores or misconstrues the clear and unequivocal testimony adduced at trial. Dr. Bryant's testimony effectively elucidates the tenor of the evidence before the jury. Dr. Bryant, a clinical veterinarian who examined birds from plaintiff's "B" and "C" complexes in the fall of 1972, testified that Fatty Liver Syndrome (FLS) and fat is a nutritional problem and he has never been able to find any infectious agent that would cause FLS or obesity in chickens (A 52-59). He repeatedly emphasized that the cause of FLS or obesity is an excessive energy intake or too many calories (A 67). "This is a problem with diet", Dr. Bryant said, "it can't come from air or water, it has to be the feed." (A 66-67). Furthermore, Dr. Bryant found "no significant disease, only fat" in plaintiff's flocks (A 63-65). Thus, Dr. Bryant's testimony clearly supports the conclusion that, as he stated, FLS or obesity "is feed problem" (A 66-67).

Dr. Bryant also analyzed plaintiff's companion flocks, which were fed on feed from A. G. Pease Co. Dr. Bryant's

examination of those sister birds revealed that none of them had FLS or obesity and 75% had no fat and were in production (A 69-71). In startling contrast, 75% of the birds fed on Purina had FLS and were not in production (A 69-70). In Dr. Bryant's opinion the Pease grain resolved any fat problem with the birds, whereas the Purina feed did not (A 76-77).

Dr. Gibb's testimony was closely analogous to Dr. Bryant's. Dr. Gibbs had examined plantiff's flock in Maine in 1971 and 1972. In his opinion 60% of the birds examined in the Maine flock (the Dostie flocks) had FLS (A 84). As to the cause of FLS, Dr. Gibbs testified that high energy consumption makes birds obese and leads to FLS. Thus FLS "is associated with high energy levels in diet" (A 89, 95). Incidentally, Dr. Gibbs refuted defentant's nutritionist, Dr. Snetzinger's conclusion, so heavily relied upon in defendant's brief at P. 33 that FLS has not been experimentally reproduced. Dr. Gibbs clearly testified that FLS has been experimentally reproduced at Michigan State University (A 89-90). Irrefutable proof that Dr. Gibbs conclusion was that FLS was caused by Purina's feed program was that he recommended to the Purina serviceman who brought the birds in for examination that they be cut back to 90% of their feed intake (Tr. 255-56). In short, in Dr. Gibb's view, the birds in the Dostie flock overrate on Purina's chow and this caused FLS and obesity.

This recommendation for an altered diet to cut back the high energy intake of the birds was, of course, consistent with the advice given to Plaintiff by Dr. Murray in the fall of 1972 to increase the protein ration of the feed to 18%, thus cutting back on the energy level of the feed. (E 10, 12). Dr. Snetzinger, defendant's chief nutritionist, made the same recommendation to plaintiff (A 171). Dr. Snetzinger also identified the source of fat in the birds as deriving from the calories and agreed that the "only source of calories is feed" (A 169-70).

Dr. Hoffman, who is not a veterinarian or a clinical pathologist, but who has had abundant experience as a chicken producer, feed manufacturer and chicken nutritionist, stated that the birds in complexes "A", "B" and "C" examined by him beginning in August 1972 were not laying and were 'fan-

tastically fat." (A 185, 190). It is misleading for defendant to contend that Dr. Hoffman "would have no part of the elusive Fatty Liver Syndrome" (Defendant's Brief at 34). What he in fact said concerning this was that he "gave a diagnosis of Fatty Liver Syndrome" (A 185) and later, "none of the birds were laying and they were very, very fat and from my point of view if I had been a veterinarion, I would have said they were fat, but the veterinarian calls that "fatty liver syndrome" (A 185). Such testimony bears no resemblance to the strained interpretation arrived at by defendant. Dr. Hoffman's examination and investigation of plaintiff's flocks revealed that the cause of FLS in plaintiff's flocks was that the birds overate and, "if birds overeat on calories, it is absolutely a feed problem" (A 188-204).

Consequently, not only could the jury have found that the feed supplied by Ralston Purina caused the obesity and FLS in the plaintiff's flocks, it is submitted that no other rational deduction could have followed.

In addition to pinpointing the cause of FLS or obesity as a feed problem, the evidence before the jury also unerringly pointed to the Purina feed as the cause of the problem. The relevant focus in this context must be the feed ration chickens receive after they go into the laying stage at 20-22 weeks of age which begins the production stage in a laying hen's life (A 17). In the laying cycle, Purina's feed contained between 14 and 15% protein (A 34, 165). In contrast, the grain supplied to the plaintiff's sister flock in the Homosote building by the Pease Grain Company had an 18% protein ratio (A 23, 33). The Pease company's serviceman, Mr. Morrill, testified without contradiction that the breeder's of most "brown egg" birds which comprised a large portion of plaintiff's flocks, recommended a protein ratio, depending on the type of bird, from 17 to 19% (A 33-34). Similarly, Dr. Murray recommended an increase in protein ratio to 18% as a remedial measure to ameliorate the gross fatty condition he saw in the birds. Thus, the clear facts before the jury were that a high protein diet, such as the Pease Company diet, is a low energy diet whereas a low protein diet, like Purina's, is a high energy diet. See e.g. (A 205, 217).

Defendant's own witnesses developed further testimony which supplied all the ingredients necessary to support the jury's verdict. Dr. Snetzinger, the individual who formulated Purina's feed program, has known for 5 or 6 years that brown egg birds have a definite tendency to overeat and he knew this when he devised the feed program administered to plaintiff's flocks (A 156-57). When the brown egg bird consumes more feed, it becomes heavier (A 156). Dr. Nesheim, another of defendant's experts, testified that fat birds do not lay as well and produce less eggs (A 282-83). His testimony clearly correllated low protein-high energy diets with excessive fat. He stated that "a protein deficiency causes an increased deposition of fat in the tissues due to the inability of the chicken to make productive use of the energy because the diet does not contain sufficient protein or amino acids for optimum growth or production, thus the animal must turn the extra energy into fat". (A 284). Dr. Nesheim's book "Nutrition of the Chicken" concludes that for optimum production, the protein ration for laying hens should be 17.5 to 18.5 per cent protein (A 285). Dr. Nesheim testified that in 1973 his research group concluded that the percent of protein could go down to 15 to 16% per day provided the amino acid balance in that protein is proper. (A 286). It should be noted that Purina's protein ratio for laying hens was reduced to 14% protein back in 1971. (A 154, 167). Dr. Nesheim's definitive work on chickens also indicates that protein levels below 14.5% are not recommended "because at lower levels, corn protein represents such a large proportion of the total protein that the amino acid levels may become imbalanced," thus resulting in a protein or amino acid deficiency (A 288). Finally, Dr. Nesheim testified that he had published reports in which he concluded that "protein or amino acid deficiency often causes an increase in liver fat content", and that "high energy diets are likely to produce higher liver and body fat content than low energy diets" (A 289-90). This testimony ties in perfectly with Dr. Hoffman's statement that as the energy level of the diet goes up, birds overeat by a constant amount, "so the higher energy the diet, the more danger you have of creating this situation (Tr. 675).

Any fair and reasonable interpretation of this testimony

unerringly points to the conclusion that the defendant's feed ration program caused a potein deficiency in the plaintiff's flocks which caused them to increase their caloric ingestion directly and proximately leading to obesity and FLS which in turn markedly decimated plaintiff's egg production. Indeed, it is submitted that any other conclusion would deviate so far from the overwhelming facts before the jury as to be unsupportable.

At this point, plaintiff would direct the Court's attention to the question of the amino acid balance in the defendant's feed, curiously raised on appeal as a defect in plaintiff's proof. The fact of this matter is that as the trial reached its conclusion, defendant, in order to protect what it believed to be a trade secret, voluntarily elected to introduce no testimony relative to the amino acid balance in its laying ration. As defendant's counsel stated, "The amino acid analysis is not contained in the report because this is a highly secretive analysis that they (Ralston) do not divulge in their reports and **will not divulge. It is a trade secret vital to their program.**" (A 372) (Emphasis Added). Significantly, plaintiff indicated just prior to this statement that it made no concession that the amino acid balance in defendant's feed was proper. (Tr. 1218). Thus, the jury was left with testimony supporting the conclusion that defendant's 14% protein ratio was too low and defendant, for reasons of its own, chose not to divulge its amino acid balance. In view of this, it is submitted that the jury could arrive at no conclusion other than the one it reached. Dr. Nesheim stated that below a 14.5% protein ratio, the lysine deficiency in feed causes the amino acid imbalance (A 288). Not one whit of testimony was forthcoming from defendant that the lysine in its feed (assuming there was any at all) met acceptable levels. Furthermore, the record is replete with references to the fact that no one can exactly measure the energy level in feed other than to conclude that a high protein feed is a low energy and vice versa (A 214, 220-21, 374).

A crucial point in this regard is that defendant's own nutritionist, Dr. Snetzinger, stated that when the problem of FLS in plaintiff's flocks came to his attention in August 1972, he recommended to plaintiff that the protein level of the feed

being given to the flocks be increased to 18% which was the same protein level the sister birds in the homosote house were being fed of the Pease Company (A 171) and the same level recommended by Dr. Murray of the University of Vermont.

In view of this state of evidence, it is submitted that the jury could have reached no other conclusion than that defendant's feed and feed program was not fit for the purposes for which it was sold to plaintiff. Defendant's evasive rhetoric does nothing to disturb the validity of the jury's verdict because rhetoric cannot negate the clear evidence in the record.

Defendant's argument that the evidence was equivocal as to the cause of plaintiff's production rates is an argument that the jury evidently disagreed with. As the review of the evidence conducted above indicates, plaintiff effectively eliminated management and disease as a source of the damage plaintiff's flocks suffered.

In this regard defendant has gleaned the Record for any inference, however slight, that something other than its feed and feeding recommendations caused the plaintiff's injury. For example, in defendant's brief at page 37 it is suggested that perhaps plaintiff brought his flocks into production too early. To arrive at this strained postulate, defendant cites the testimony the University of Vermont Extension Service Specialist, Mr. Mercia, whose testimony in fact was that if the chickens were put in production at 20 weeks instead of 22 weeks, "we would expect a **slight** decrease in the number of eggs **during the period.**" (A311) (Emphasis added). Mr. Mercia did not say how much the decrease would be and the clear import of his testimony is that the slight decrease he referred to was only for a duration of two weeks. Beyond that, defendant conveniently ignores the advice of its own employee, Dr. Ragland, to plaintiff on August 5, 1970 that the birds should be started on a laying feed ration at "22 weeks of age or 5% production whichever comes first", the obvious meaning of which was that birds can be put into production earlier than 22 weeks (E 32). Furthermore, defendant's expert on chicken nutrition, Dr. Nesheim, stated that birds approach maturity at 20 to 22 weeks of age, and although he preferred to see birds kept out of

production "a little beyond" 22 weeks, he was unable to give an exact figure as to when birds should be placed in production since it depends somewhat on the flock's situation as they are being reared (A 280-81). Of course, Dr. Nesheim had never seen plaintiff's flocks. Defendant also ignores the testimony of Mr. Morrill from the Pease Grain Co. who testified that birds such as those in plaintiff's complexes "A", "B" and "C" begin laying at 20 to 21 weeks (A 17). The importance of defendant's argument in this context further diminishes when it is considered that birds have a production cycle from 12 to 13 months (A 17). However, defendant seizes upon this extraneous inference in an attempt to obfuscate the true state of the evidence before the jury, namely that its feed and feed program was isolated as the cause of plaintiff's production problems.

Defendant also suggests without cited authority that expert testimony was necessary in order to show that the degree or amount of plaintiff's loss was defendant's responsibility. Plaintiff submits that the other factors affecting chicken production management and disease were eliminated as causative factors and that the defendant's feed and feeding program was isolated by the credible expert testimony of the witnesses. Furthermore, the uncontradicted state of the evidence demonstrated that the production curves or lines on plaintiff's production charts which plaintiff obtained from the bird's breeders and used to measure damage to production represented the difference between the production plaintiff actually received and the normal rate of production to be expected from these birds under normal conditions (A 18-20, 37). Thus, there was before the jury evidence as to the production the birds should have attained, uncontradicted evidence of what they actually did attain and abundant evidence of the cause for such loss. It is submitted that it was not beyond the ken of the jury to reach a conclusion concerning the amount and degree of the plaintiff's losses where the factors from which the jury could draw a conclusion relative to the amount of damages were before it.

The keystone for the use of expert testimony is the necessity for the expert's special skill, training or expertise. It is

submitted that all the relevant facts and data were introduced into evidence in the instant case and the jury was competent to draw a reasonable inference or form a conclusion therefrom as to the damages in the case. Thus, there was no need for expert testimony as to the damage question. See 32 C.J.S. Evidence Sec. 445 and cases cited therein.

In any event, there was evidence from the experts from which the jury could find that the lost production from the obesity and FLS caused by the Purina feed was within acceptable and expected levels. Dr. Hoffman was asked about this subject on cross-examination and he responded that such losses are possible and reasonable. "In other words, it is not hard for me to accept the fact that you would lose this much production having overweight chickens". (Tr. 721). Defendant never rebutted this statement.

Dr. Bryant testified that with birds suffering from this obese condition, production can be expected to be reduced up to 30% of the normally accepted production curves (A 62-63).

On the subject of the production charts which plaintiff utilized to determine the degree of diminution in its egg production, the evidence is clear that certain charts marking low production were biased in favor of the defendant since the charts that were used in several instances had lower production curves than the production capabilities for the birds that actually comprised the flocks represented on those flocks (Tr. 717-18, E 3, E 7).

To sum up this point, there was abundant evidence that the birds were obese and that they suffered from FLS. This debilitating phenomenon was tied to defendant's feed by clear and convincing testimony. Far from being equivocal, the evidence on the cause of problems with plaintiffs flocks was directly laid at defendant's doorstep and the jury properly concluded that is where the responsibility rested. This Court should not disturb that finding.

III.

THERE WAS AN ADEQUATE BASIS FOR THE INTRODUCTION OF EXPERT TESTIMONY RELATIVE TO FLOCKS A-1, B-1 AND C-1

Defendant's next contention is that Dr. Hoffman's reply to a hypothetical question by Plaintiff's counsel should not have been admitted and that by allowing such testimony, the Court committed reversible error.

There was expert testimony that sending birds into the production cycle in too fat a condition will lead to obesity. As Dr. Hoffman testified:

> I didn't ask him (Mr. LeRiche) how the pullets were raised. I asked him how the pullets were when he housed them and I was concerned because he said they were beautiful, and in my experience beautiful pullets always tend to be a source of a problem. If they don't look too hot, that means probably they will get in there and get on a good diet and go. When pullets come in beautiful and they are plump, I start to worry.

Similarly, Dr. Bryant testified that "Birds coming into production being housed that are too fat, too good condition, will start off right away with low level fatty liver syndrome". (A 75).

Dr. Hoffman had been in attendance every day of the Trial (A 183-84). Upon examination, after he was qualified as an expert, he was asked the following question:

> Doctor, assume that the testimony of Mr. LeRiche, as indicated, that the birds that were housed in 1971 looked the same, exactly the same as the birds did going into the houses in 1972, and assume further that the feed program in 1971 for these flocks on which we claim a loss of production was the same as the birds in 1972 and assume further that the low production was very similar, if not exactly the same in 1971 as in 1972 . . . . . .
>
> (AND) assume further that there were no disease factors which would seriously affect production.
>
> Do you have an opinion as to whether or not the cause of the poor production is the same? (A 208-09).

Dr. Hoffman answered in the affirmative and added that

those facts are consistent with the diagnosis of the birds becoming too fat because they overconsumed on energy which is, of course, a feed problem. (A 209-10).

The rejection or allowance of a hypothetical question is a matter largely entrusted to the discretion of the Trial Judge. **Marsigli's Est. v. Granite City Auto Sales,** 124 Vt. 95, 197 A.2d 199 (1964). Furthermore, an expert witness who has heard all the testimony may give an opinion as indicated by the state of facts in evidence. **Fairchild v. Bascomb,** 35 Vt. 398 (1862). As the Vermont Supreme Court ruled in **Marsigli Estate, supra,** although an inquiry by hypothetical question include only data which there is a fair possibility the jury will accept, the tendency of the evidence in the hypothetical is all that is required. See also **Perkins v. Vermont Hydro-Electric Corporation,** 103 Vt. 367, 177 A.2d 631 (1935). It is submitted that the hypothetical question challenged by Defendant met this standard and, thus, this effort to escape the jury's verdict must fail.

It is significant to note that Defendant's brief only challenges the first assumption, that the birds looked the same going into the laying cycle in 1971 as the birds going into production in 1972 looked. Defedant devotes pages 38 through 42 on this point, yet it has chosen to focus exclusively upon the first assumption in the hypothetical.

With regard to the birds that went into production in complexes "A", "B" and "C" at the end of 1970 and the birds that went into the Dostie flock, Mr. LeRiche testified clearly and succinctly that these birds looked the same as the birds which were housed in 1971 which were designated as flocks A-2, B-2 and C-2. (A-125). Mr. LeRiche testified that the birds were "good plump birds" with "good shiny feathers and nice red combs" (A 125). The most telling point here is that there was no contradiction of the testimony that the birds in flocks A-1, B-1 and C-1 and the Dostie flock looked the same as the birds in flocks A-2, B-2 and C-2 when they went into the laying cages. Dr. Murray, from the University of Vermont, made a report on June 9, 1971, which concluded that Plaintiff's birds from the Vermont flock had excess fatty condition at 23 weeks

of age. (E 51). Therefore, the assertion on Page 42 of Defendant's brief that not one of the diagnostic reports between 1970 and June, 1972, mentioned excess weight is obviously a distortion. It should also be noted that Mr. Gauthier, Defendant's serviceman, received this report in June of 1971, which effectively rebuts Defendant's contention that when Mr. Gauthier said Plaintiff's birds were "Tops", he was referring to the absence of overweight or fatty condition of the birds because he knew in 1971 that Dr. Murray had found them to be fat. (A 321, 322).

Defendant makes a separate argument that the assumption as to plump birds going into the laying cycle is inapplicable as to flock C-1. The basis for this argument is that 4,000 birds in this flock were replaced in July or August of 1971, [illegible] months after the flock had begun producing, with birds which were 20 weeks of age and that Plaintiff did not testify what these 4,000 birds looked like going into the laying stage. What Defendant fails to recognize is that Plaintiff testified that all of the 33.000 birds which originally comprised flock C-1 were plump but more importantly, that in the five or six months preceding the introduction into the flock of the 4,000 replacements, the flock experienced a production loss of from approximately 14% to 20%, and in the 6 or 7 month period after the new birds were introduced, the flock's production loss varied from 17% to 24% which Plaintiff submits was no appreciable change in the flock's production (E 6). Thus, the jury could reasonably have inferred that both the new birds and the existing birds were similarly debilitated by the Ralson feed program and that these new birds had no appreciable effect on the already low production. In addition, it should be noted that Plaintiff introduced demonstrable damages of $336,764.74 and the jury's verdict was only $298,870.00. Thus, it is possible that the jury's verdict took this suggestion by Defendant into consideration.

Thus, Plaintiff submits that more than the requisite requirement of a tendency of the evidence was before the jury to support this aspect of the hypothetical question and that Defendant's suggestion that the question was inappropriate on this basis is inapposite.

Defendant has chosen not to challenge the appropriateness of the remaining assumption in the hypothetical question and consequently, there is no necessity for Plaintiff to respond to a point not briefed by Defendant. Plaintiff submits, however, that the three remaining factors in the hypothetical have abundant and clear support in the record and thus, the question asked of Dr. Hoffman was proper and provides no basis for alteration of the jury's verdict.

IV.

THE DAMAGES SUFFERED BY PLAINTIFF WERE CLEARLY DEMONSTRATED AND NOT SPECULATIVE

Defendant's final argument is that the proof of Plaintiff's damages finds no support in the record and thus the jury was left to conjecture and speculation. Plaintiff has already alluded to the manner in which damages were proven. However, in view of the space Defendant's brief devotes to this issue, some expansion of this point is necessary.

Defendant's brief concedes that Plaintiff "produced highly specific calculations as to its lost expectations," (Defendant's brief at 43), but contends that it had no legitimate basis for these expectations. It is submitted that the goal performance charts utilized by Plaintiff in calculating its damages were not "idealized" as Defendant contends. Moreover, the damages claimed by Plaintiff were geared to the lower range of the production charts and, in several instances, biased in favor of Defendant. As Mr. Morrill indicated, the charts which Plaintiff introduced showed the production to be expected from these birds under normal conditions (A 18-20, 37). Dr. Hoffman testified in no uncertain terms that the curves on the charts are "readily attainable" and "practically achievable" levels of production. (Tr. 698). In this context, Dr. Hoffman was asked, "So it is not just something we hope for"? He responded, "It is not a goal in the sense this represents the fastest you can run or the highest you can lay". (Tr. 698). Furthermore, the chart of losses in flock B-1 was biased against the Plaintiff and in favor of the Defendant because it was a brown bird production chart measuring the performance of white birds which generally produce at a higher rate than a brown bird. (A 257-58). In this context, an effective rebuttal to Defendant's argument that Plaintiff had shown no proven track record in raising chickens, the jury need only have looked to Plaintiff's Exhibit 20 which was the production graph for the sister birds fed on Pease Company grain. This graph showed the Plaintiff's flock over the minimal expected production and comfortably within the range set for normal egg production. The significance of this proof is enhanced when it

is considered that this was a white bird chart measuring brown birds and thus, the production figures would favor the Defendant. (A 233). There was, therefore, abundant evidence from which the jury could determine the production Plaintiff should have received if the Ralston Purina feed performed as warranted. It should be noted in passing that Defendant's suggestion that proof of Plaintiff's "track record" or prior performance history was essential to its proof or damages is a spurious argument, triggered by its failure to prove this contention at Trial. In view of the abundant testimony from Plaintiff's and Defendant's witnesses alike that Plaintiff's flocks had good management, and in view of the success experienced in the Homosote flock fed on Pease Company grain, there was an ample basis for the jury to conclude that the flocks should have met the production curves. If Defendant wished to attack Plaintiff's track record, it could have done so at the Trial by cross-examining Plaintiff's witnesses or producing its own witnesses. The time for such proof is now past and Plaintiff suggests that it is improper for Defendant to attempt to shift its own inadequacy of proof onto Plaintiff. Finally, Defendant mistakenly represents that Plaintiff claimed the maximum levels of each chart. On the charts where two production graphs were present, i.e., the white bird egg production charts, there was approximately a 9 per cent differential in production. (E 1, 4, 5, 8, A 293, Tr. 880). However, Plaintiff only claimed lost production from the lower percentage figure on these charts (A 292-94). This clearly favored Defendant.

It is submitted that Defendant's argument that the computation of the eggs actually lost was inaccurate is an amalgam of possibilities and potentialities wholly refuted by the clear weight of the evidence which the jury evidently believed. For example, Defendant contends that Plaintiff's statement that "sometime mechanical failure happens and you get 100 eggs go on the floor" supports its argument that the damage figures were unreliable. In the first place, Plaintiff can find no support on the quoted page (A 335) for the Defendant's assertion that such losses were not accounted for in Plaintiff's charts. Beyond that, Plaintiff's statement gives no indication whether or not

the eggs which allegedly broke had already been counted. For all the evidence revealed, the eggs which broke were not counted at the time they broke. Furthermore, Plaintiff's proof showed egg losses of approximately 800,000 dozen. For Defendant to contend that 100 eggs which were lost "some times" established Plaintiff's losses as conjectural is an extravagant contention in light of the large numbers of eggs lost.

Defendant has never cited the transcript for eggs lost as a result of falling through the slats or being eaten. (A 295, 311). Plaintiff has searched those pages of the Record in vain for reference to such testimony. Furthermore, once again, Defendant attempts to extend the fact of a broken egg to the reason for Plaintiff's lowered production without ever demonstrating that such eggs were in fact counted or included in Plaintiff's computation of damages. Mr. Mercia laid this matter to rest at the Trial when he explained that the charts used by Plaintiff reflected the eggs which are actually picked up and thus no allowance for breakage, etc., should be considered. (A 294-95).

Plaintiff introduced extensive evidence concerning the methodology employed by Plaintiff in collecting and accounting for eggs. (A 102-06, 107-112, 250, Tr. 757) and Mr. Mercia testified that the method used was a good one. (A 261). It is submited that this evidence did not leave the jury to conjecture and speculation as to the damages suffered by the Plaintiff but rather were as close and accurate as could be done under the circumstances. Mr. Mercia clearly indicated that after personal observations and comparisons with other egg producers who had modern equipment like Plaintiff's, the amount of egg breakage was consistent and not greater than the other producers. (A 314-15). Mr. Mercia also personally observed Plaintiff's collection procedure when eggs were not gathered for one or two days on a weekend and then gathered on Monday and he found no substantial difference in the amount of eggs cracked or broken by this method compared to the daily method of collection. (A 313). This casts great doubt on Defendant's unsubstantiated claim that it was "impossible" for Plaintiff to handle the eggs when they had accumulated for days (Defendant's brief at 45) and also provides clear testi-

mony from which the jury could discount egg collection procedures as a cause of the low production. Plaintiff therefore urges the Court to reject Defendant's argument on this point and reaffirm the jury's determination.

CONCLUSION

This is a complicated case factually in which Plaintiff's four theories of action were reduced to only one, breach of warranty. The jury, after careful deliberation, returned a verdict for Plaintiff in the amount of $298,870.00. Defendant, the largest poultry feed manufacturer in the world, presumably had every recourse and asset to defeat this claim on the facts. It failed in such an effort and in this appeal, essentially seeks to place this Court in the position of an additional juror sifting and weighing the facts and inferences as the jurors did. It is submited that this is not the function of this Honorable Court. Taking the evidence and inferences therefrom in the light most favorable to Plaintiff, it is submitted that this appeal must fail and the decision of the jury and judgment below must be affirmed.

Respectfully submitted,

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